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THE RIGHT OF WITHDRAWAL FROM A PUBLIC ENTERPRISE. — The law of public callings has not very definitely determined the extent of liability undertaken by the grantee of a public franchise. Where the franchise is permissive in its terms the grantee is not held bound to make use of the privileges granted;<sup>1</sup> and in the absence of a covenant or of the acceptance of the franchise upon the condition of an exercise thereof, the only remedy against the grantee would seem to be *quo warranto* and forfeiture of the franchise for non-user.<sup>2</sup> Once having begun an exercise of the franchise, however, the grantee's duty to duly regard the public interest is recognized and enforced by the state.<sup>3</sup>

But does this duty involve an obligation to continue the exercise of the franchise, or may the grantee abandon its use? Where an integral part of the public service has been discontinued, while the operation of the whole might be conducted at a profit, mandamus is usually allowed to secure a continuance;<sup>4</sup> but authority on this point is divided in the case of carriers, where an entire section of the road is discontinued because its operation involves financial loss.<sup>5</sup> In such cases an attempt is made to abandon the franchise in part. But the law clearly regards the franchise as an entirety, so that an order to operate the whole road would seem a proper regulation of the use of the franchise; for the inconsistency of retaining a franchise and refusing

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<sup>1</sup> York & North Midland Ry. Co. v. Queen, 1 El. & Bl. 858.

<sup>2</sup> See People v. The Albany & Vt. R. R. Co., 24 N. Y. 261; State ex rel. Knight v. Helena Power & Light Co., 22 Mont. 391.

<sup>3</sup> Atlantic Coast Line v. N. Car. Corp. Com'n, 206 U. S. 1.

<sup>4</sup> Union Pac. R. R. Co. v. Hall, 91 U. S. 343; People v. St. L., A., & T. H. R. R. Co., 176 Ill. 512; State v. Hartford & N. H. R. R., 29 Conn. 538.

<sup>5</sup> San Antonio St. Ry. Co. v. State, 90 Tex. 520; State ex rel. Grinsfelder v. Street Ry. Co., 19 Wash. 518.

to regard the public interest as a whole is apparent.<sup>6</sup> Indeed, state regulation would be rendered ineffective if particular unprofitable parts of the enterprise could be discontinued at will.<sup>7</sup>

Where, however, the operation of the entire road has been abandoned by an insolvent carrier, mandamus is refused.<sup>8</sup> These cases have been rested either on the restriction upon state regulation imposed by the Fourteenth Amendment,<sup>9</sup> or on the theory that the financial failure of the enterprise indicates a lack of public demand for its continuance.<sup>9</sup> It is, however, suggested in the general law on this subject that an arbitrary abandonment of the franchise might be denied.<sup>10</sup> If the grantee is an agent of the state in conducting the public enterprise, as the relation is sometimes conceived, or is a trustee for the state of the property and interests acquired by exercise of the franchise, the obligation to continue operations would seem clear; for this agency would involve a contractual obligation. Just here, however, is a difficulty; for though a contract between the state and the grantee is admittedly conceivable, yet in the usual grant of a permissive franchise the elements of contract are entirely lacking. Indeed, if the relation between state and grantee was based on contract, obviously the Fourteenth Amendment would not apply. Again, the grantee is not properly a trustee with the duty to continue the trust until relieved from office; for the state is interested in no wise in the ownership, but only in the use, of the property. Then, if the Fourteenth Amendment protects the property of the grantee, it would seem that its provisions should equally protect his liberty; and that a duty imposed by the state to continue a use of the franchise would violate this fundamental right. But aside from the constitutional protection thus afforded, it is submitted that a public franchise merely grants permission to exploit an enterprise in which the state is necessarily interested; that the power of the state is limited to regulation of the actual exercise thereof; that this enterprise voluntarily engaged in may be discontinued at will; and that the service of the public, upon which the exercise of the franchise is based, involves only the duty not to discontinue until after reasonable notice is given.<sup>11</sup> In a recent case mandamus was allowed ordering a municipal corporation to continue the exercise of a ferry franchise. *In the Matter of Wheeler*, 40 N. Y. L. J. 1117 (N. Y., Sup. Ct., Dec. 1908). It is clear that the legislature may direct the conduct of a municipality and impose pecuniary burdens.<sup>12</sup> And support for this case must be found in a legislative direction for such continuance contained in the franchise granted.<sup>13</sup>

THE VIRGINIA RATE CASES. — For many years an approved method of attacking unconstitutional state legislation has been to ask a federal court to enjoin state officers from enforcing it. Given the ordinary grounds for equitable and federal jurisdiction, the injunction issued,<sup>1</sup> despite the

<sup>6</sup> Savannah Canal Co. v. Shuman, 91 Ga. 400; People *ex rel.* Town of Schaghticoke v. Troy & Boston R. R. Co., 37 How. Prac. (N. Y.) 427.

<sup>7</sup> See 21 HARV. L. REV. 49.

<sup>8</sup> Ohio & M. Ry. Co. v. People, 120 Ill. 200; Jack v. Williams, 113 Fed. 823.

<sup>9</sup> See Commonwealth v. Fitchburg R. R. Co., 12 Gray (Mass.) 180.

<sup>10</sup> See note, 24 L. R. A. 564; Akron v. East Ohio Gas Co., 53 Oh. L. Bull. 218 (Oh. C. P., Nov. 1908).

<sup>11</sup> Indianapolis Gas Co.'s Case, 35 Chic. Leg. News 165 (Dec. 30, 1902).

<sup>12</sup> Prince v. Crocker, 166 Mass. 347.

<sup>13</sup> See Mayor, etc., of N. Y. v. Starin, 106 N. Y. 1, 15, 16.

<sup>1</sup> Smyth v. Ames, 169 U. S. 466.